MALAYSIAN REPORTS

CHOO FAH FATT & ANOR. v. CHE RUS BIN OTHMAN & ORS.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), and Wan Suleiman F.J.) January 3, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 65 of 1976]

Tort — Negligence — Collision between army vehicle and civilian vehicle — Injured soldier claiming damages — Whether driver of military lorry and his employer the Government can be made liable for contribution — Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6(1)(c) — Civil Law Act, 1956, s. 10(1)(c) — Government Proceedings Ordinance, 1956, s. 14.

Government Proceedings — Exemption from liability — Government Proceedings Ordinance, 1956, s. 14.

In this case there had been a collision between a military lorry and a civilian lorry. A soldier on the military lorry was injured and he sued the first and second appellants claiming damages for negligence. The appellants brought in the army driver and his employer, the Malaysian Government, as third parties. The learned trial judge found that the civilian driver was 60% and the army driver 40% to blame for the accident, but he dismissed the claim for contribution, because of the operation of section 14 of the Government Proceedings Ordinance, 1956. The question which arose in this case was — "If a soldier riding in an army vehicle is injured through the combined negligence of another soldier driving that vehicle and that of a civilian driver, can the civilian driver (and his employer) recover contribution from the army driver and the Government, his employer?"

Held: under section 14 of the Government Proceedings Ordinance neither the army driver nor the Government can be held liable in judgment for the injury suffered by the plaintiff and therefore the claim for contribution was rightly dismissed in this case.

Cases referred to:-

(1) *George Wimpey & Co. Ltd.* v. *B.O.A.C.* [1955] A.C. 169.

(2) *Hart* v. *Hall and Pickles Ltd.* [1969] 1 Q.B. 405.

(3) *Stott* v. *West Yorkshire Road Car Company* [1971] 2 Q.B. 651.

(4) *Adams* v. *War Office* [1955] 1 W.L.R. 1116.

The following authorities were also cited in argument: *Kosnan* v. *Phua Huat Choy* [1966] 2 M.L.J. 233, 234B, headnote; *Tay Koh Yat Bus Co. Ltd.* v. *Chua Chong Cher & Ors.* [1972] 1 M.L.J. 183; *Sepang Omnibus* [1970] 2 M.L.J. 234, 236; *Littlewood* v. *George Wimpey & Co. Ltd. & B.O.A.C.* [1953] 2 Q.B. 501; *Rasidin bin Partorjo* v. *Frederick Kiai* [1976] 2 M.L.J. 214; *Post Office* v. *Official Solicitor* [1951] 1 All E.R. 522, 526A; *Drinkwater & Anor* v. *Kimber* [1952] 2 Q.B. 281, 291; *Parker* 112 C.L.R. 295, 301.

FEDERAL COURT.

C. Abraham for the appellants.

J.C. Fung for the respondents.

Lim Beng Choon (Senior Federal Counsel) for the third parties.

Suffian L.P.: If a soldier riding in an army vehicle is injured through the combined negligence of another soldier driving that vehicle and that of a civilian driver, may the civilian driver (and his employer) recover contribution from the army driver and the Government, his employer? — that is the main question in this appeal.

There was a collision between two lorries at 9½ mile, Batu Kitang Road, not far from Kuching in Sarawak. One of the lorries belonged to the Army. The plaintiff (a soldier) travelling on it was injured. He sued the driver and the owner of the other (a civilian) lorry, first and second defendants and before us first and second appellants, claiming damages for negligence. He did not sue the army driver. The first and second defendants, however, brought in the army driver and his employer (the Malaysian Government) as third parties. The defendants alleged that the accident was due entirely to the negligence of the army driver and say that if they are liable they should get contribution from the third parties under section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 of England which then applied to Sarawak. That provision reads as follows: —

"Where damage is suffered by any person as a result of a tort (whether a crime or not)... (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise...."

It will be noticed that this provision is identical with section 10(1)(c) of our Civil Law Act, Act 67.

In the event the learned trial judge found that the civilian driver was 60% and the army driver 40% to blame for the accident, but dismissed the defendants' claim against the third parties for contribution, because (he says) of the operation of section 14 of the Government Proceedings Ordinance, 1956, of which the relevant part provides as follows: —

"(1) Nothing done or omitted to be done by a member of the forces [say A] while on duty as such shall subject either him [A] or the Government to liability in tort... for causing personal injury to another person [say B], in so far as the death or personal injury is due to anything suffered by that other person [B] while he is a member of the forces if —

(a) at the time when that thing is suffered by that other person [B], he [B] is... on duty as a member of the forces...; and

(b) the Minister of Finance certifies that his [B's] suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under any written law relating to the disablement or death of members of the forces of which he [B] is a member:

Provided that this sub-section shall not exempt a member of the said forces [A] from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his [A's] duties as a member of those forces.

(2) ....

(3) The Minister charged with the responsibility for defence and internal security, if satisfied that it is the fact —

(a) that a person was or was not on any particular occasion on duty as a member of the forces; or

(b) ....

may issue a certificate certifying that to be the fact; and any such certificate shall, for the purposes of this section, be conclusive as to the fact which it certifies."

The defendants appeal arguing, first, that the army driver was wholly to blame and, secondly, that the third parties are not protected by section 14.

As already stated by us at the end of Mr. Abraham's arguments on behalf of the appellants, we dismissed the appeal as to liability, as we were of the opinion that in the circumstances of this case it would be wrong of us to disturb the findings of fact made by the learned trial judge. Also, as already stated during the course of arguments, we allowed the cross-

appeal by the plaintiff, claiming that interest at 6% p.a. be paid to the plaintiff from the date of service until the date of payment.

Thus there remains only the question whether or not the third parties are protected by section 14 of the Government Proceedings Ordinance.

To return to section 6(1)(c) of the 1935 Act, that provision has been considered in several English decisions, of which it is enough to mention two.

First there is *George Wimpey & Co. Ltd.* v. *B.O.A.C.*,[1] a House of Lords decision. There Viscount Simonds said at page 178:

"It appears to me that the first matter for consideration is what is the meaning of the word 'liable' where it is secondly used in section 6(1)(c) and I think it is plain beyond argument that it means *held liable in judgment.* No other meaning can reasonably be attributed to it in the context 'would if sued have been', for these words make a suit the condition of liability.... Contribution is recoverable from one who in an actual suit by the injured man has been *held liable by judgment:* it is recoverable from one who, if sued, would in that hypothetical suit have been *held liable.*"

In the second case *Hart* v. *Hall & Pickles Ltd.*,[2] Lord Denning M.R. at page 410 said:

"Those words [of section 6(1)(c)], as construed by the House of Lords, covered two situations:

(1) where a tortfeasor has been sued and has been held liable; and

(2) where a tortfeasor has not been sued, but, if he had been sued, he would have been liable."

It is quite clear from these two cases that the defendants here can recover contribution from the third parties if and only if they have been sued and been held liable in judgment for the plaintiff's injury or if they have not been sued but would if sued have been held so liable.

Mr. Abraham on behalf of the defendants seeks to persuade this court that the word "liable" the second time it appears in the section means not only "held liable by judgment" but also "responsible in law", which the third parties were though not held liable by judgment, and he cited in support this passage from Lord Denning's judgment at pages 656-7 in *Stott* v. *West Yorkshire Road Car Company*[3]:

"I am of opinion that the word 'liable' does mean 'responsible in law'. It follows that a tortfeasor is entitled to recover contribution from another tortfeasor

(i) when he has been held liable in judgment;

(ii) when he has admitted liability; and

(iii) when he has settled the action by agreeing to make payment to the injured person, even though, in making the settlement, he has not admitted liability."

But with respect I prefer the judgment of the House of Lords in the case first cited. In any event, the third parties here have not admitted liability nor settled the plaintiff's claim.

The next question that arises is whether the third parties here could if sued have been held liable in judgment for the plaintiff's injury. In my view they cannot, but unfortunately no judicial authority either here or in England can be found by counsel, but nevertheless it is supported by textbook writers.

Section 14 of our Government Proceedings Ordinance is *in pari materia* with section 10 of the English Crown Proceedings Act, 1947.

Bickford Smith in his commentary in *Butterworths Annotated Legislation Service* on the Crown Proceedings Act, 1947, says at pages 31 and 32:

"By section 10(1), the Crown is exempt from any liability in tort for death or personal injury caused by a member of the armed forces of the Crown when on duty to another member of the armed forces, provided that the latter is ... on duty ... and the Minister of Pensions certifies that the ... injury will be treated as attributable to service for pension purposes.

Moreover, not only is the Crown exempted from the vicarious liability which it might otherwise incur in respect of torts committed in such circumstances, but this exemption is extended to the actual tortfeasor, subject, however, to a proviso that the exemption is not to apply where the court is satisfied that the tortious act or omission was not connected with the execution of his duties as a member of the armed forces....

These provisions can be justified on several grounds. It is often impracticable and indeed, undesirable that accidents or injuries arising during training (and, *a fortiori*, during operations) should be the subject of actions in the ordinary courts, for the nature of the training and duties of the armed forces may necessarily involve extraordinary risks and be carried out in conditions which have no counterpart in civil life. Secondly, the exemption only applies where the injured party has pension rights in respect of the injury complained of. The provision exempting the actual tortfeasor from liability was clearly necessary in order to avoid a return to the practice of suing a servant of the Crown in the expectation that the Crown would 'stand behind' him.

....

A somewhat anomalous position arises if a member of the armed forces is tortiously injured by a fellow member of the forces and a civilian, jointly, in circumstances in which the former is exempted from liability by section 10(1) [of the English Crown Proceedings Act, 1947]. Such a thing might occur where a soldier riding in an army lorry was injured by the combined negligence of a soldier driving the lorry on duty and of a civilian driver of another vehicle. In such circumstances the injured party has a right to sue the civilian tortfeasor and obtain judgment against him for the whole damage suffered; the civilian on the other hand would have had a right, under section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935 to recover contribution from the service tortfeasor, were it not for the provisions of this section. The effect of section 10(1)... is to bar the right to contribution in such cases. At the suggestion of Lord Simonds in the House of Lords a provision was at one stage inserted to prevent prejudice to the civilian tortfeasor from this situation, and provided that the damages which the injured party might otherwise recover from a civilian tortfeasor should be reduced by the amount of the contribution which the service tortfeasor would have had to pay had he not been exempted from liability by section 10(1)..., the injured party receiving compensation for this reduction in the shape of the pension rights, the existence of which is a condition of the exemption. For some reason, however, this provision failed to find favour with the House of Commons and was deleted, leaving the present anomaly."

R.M. Bells in his book "Crown Proceedings" says at page 35:

"20. As a result of these exemptions from liability contained in section 10,... a quite anomalous situation may sometimes arise. If a soldier, who is a passenger in any Army vehicle driven by another soldier acting in the course of his duties, is injured in a collision between that vehicle and a vehicle driven by a civilian, in such circumstances that the blame must be apportioned between the drivers, the injured soldier can recover full damages from the civilian, and the civilian will have no right to claim contribution from the soldier driver under the Law Reform (Married Women and Tortfeasors) Act, 1935, because of the provisions of section 10(1) of the Crown Proceedings Act, 1947. Presumably the House of Commons, which struck out an amendment by the Lords to remedy this defect, felt that the desirability of transferring any possible detriment from the injured soldier to the motorists' insurance companies outweighed the claims of abstract justice."

Winfield & Jolowicz on Tort, 9th Edition, at page 560 says:

"The [Law Reform (Married Women and Tortfeasors)] Act gives the right to contribution to any 'tortfeasor' who is 'liable' in respect of the plaintiff's damage, and it is given to him only against another 'tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise'. It follows that where a plaintiff, P, has been injured by the concurrent negligence of two defendants, D1 and D2, then if D1 is not liable to P because of some defence open to him the entire loss must be borne by D2."

Salmond on Torts, 12th edition, has this to say at page 90:

"By section 10(1) the Crown is exempt from liability in tort for... personal injury caused by a member of the armed forces when on duty to another member of the armed forces, provided that the latter is... on duty... and the Minister of Pensions certifies that the... injury will be treated as attributable to service for pension purposes. It should be noted that the exemption is extended to the actual wrongdoer himself unless the court is satisfied that the act or omission complained of was not connected with the performance of his duties."

Then in footnote 21 on the same page Salmond adds this:

"Injustice may, however, arise in the not unlikely case of a member of the armed forces being... injured by the combined negligence of a fellow-member of the armed forces and a civilian in circumstances covered by section 10(1). In such a case the civilian will be liable for the whole of the plaintiff's damage without any right of contribution or indemnity from the service tortfeasor."

Here the plaintiff is a soldier, and so is the first third party; it is not disputed that at the time of the accident both the plaintiff and the army driver were on duty as members of the forces; and there is a certificate by the Minister of Finance (exhibit TP2) that the plaintiff's suffering the injury has been treated as attributable to service for the purposes of entitlement to an award under written law relating to the disablement or death of members of the forces of which the plaintiff is a member. It therefore follows that in these circumstances under section 14 of the Government Proceedings Ordinance neither the army driver nor the Government can be held liable in judgment for the injury suffered by the plaintiff.

It is said that in fact the plaintiff is still in the armed forces and has not received any award under the relevant law in respect of the injury, but on the authority of *Adams* v. *War Office*,[14] this does not affect the position, and no doubt the plaintiff will get something from the Government when he eventually leaves the army.

For the above reasons I would dismiss this appeal, with costs. The appellants' deposit to be paid to the respondents against their taxed costs. As there are three respondents I would order $166.67 of the deposit to the plaintiff and the rest to the third parties against taxed costs.

I cannot depart from this case without observing that this appeal was heard exactly seven years to the day after the date of the accident, which delay vividly illustrates the desirability of Government considering whether or not the New Zealand system of compensating victims of road accidents should be introduced into this country. Under that system the plaintiff would have got his money within months without the anxiety and expense involved in having to prove negligence and the courts would have been freed to get on with other work.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore* instructed by *Ee, Lim & Leong*, Kuching; *Reddi & Co.*

CHAN KWON FONG & ANOR. v. CHAN WAH

[F.C. (Ali Ag. C.J. (Malaya), Raja Azlan Shah and Wan Suleiman F.JJ.) January 6, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 25 of 1976]

Conflict of Laws — Tort committed abroad — Conditions to be fulfilled for action to lie in Malaysia — Onus of proving that actional wrong under foreign law committed in foreign country.

Tort — Conflict of Laws — Conditions to be fulfilled for action to lie in Malaysia.

In this case the respondent had sued the appellants for damages for injuries sustained in the course of employment arising from an alleged unsafe system of work. The accident took place in Samarinda, Kalimantan, Indonesia. Judgment was given for the respondent and the appellants appealed.

Held: (1) an action for tort will only lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. First the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed;

(2) in this case while there was no doubt that the wrong done to the respondent was actionable in Malaysia, there was doubt whether an actionable wrong to Indonesian law had been committed in Indonesia;

(3) the onus of proof that the wrong was actionable in the foreign country was on the plaintiff and as the respondent, who was the plaintiff in the action, had led no evidence on the point, the appeal must be allowed and the claim dismissed.

Cases referred to:-

(1) *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1, 28-29.

(2) *Boys* v. *Chaplin* [1971] A.C. 356.

(3) *Liverpool, Brazil and Ravis Plate Steam Navigation Co. Ltd.* v. *Banham (The Halley)* (1868) L.R. 2 P.C. 193.

(4) *Machado* v. *Fontes* [1897] 2 Q.B. 231, 235.

(5) *Koop* v. *Bebb* (1951) 84 C.L.R. 629.

(6) *Anderson* v. *Eric Anderson Radio and T.V. Pty. Ltd.* (1965) 114 C.L.R. 20, 42.

FEDERAL COURT.

J.G. Bernatt for the appellants.

Shee Koon Ruay for the respondent.

Raja Azlan Shah F.J.: The appellants in this case are the defendants in an action before the High Court in which they are sued by the respondent for damages for injuries sustained in the course of employment arising from an alleged unsafe system of work. By his statement of claim the respondent alleges that the appellants were guilty of negligence in not providing a safe system of work.